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No. 73-671

In the

Supreme Court of the United States

OCTOBER TERM, 1973

MAYER PAVING AND ASPHALT COMPANY, an Illinois corporation, and LEE O. MAYER, sole surviving partner of Mayer Paving Company, a co-partnership,

Petitioners,

vs.

GENERAL DYNAMICS CORPORATION, a Delaware corporation, and MATERIAL SERVICE CORPORATION, a Delaware corporation,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

SUPPLEMENTAL AND REPLY BRIEF

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SUPPLEMENTAL AND REPLY BRIEF

Petitioners file this supplemental and reply brief calling attention to new matter and to the arguments raised in the brief in opposition.

I.

Conflicts Of Decision Have Arisen In The Fifth, Seventh, And Ninth Circuits Since The Filing Of The Petition In This Proceeding.

Within the past 90 days three Courts of Appeal, the Fifth, Seventh, and Ninth Circuits, with a total of 18 judges sitting, have variously opined on the correct interpretation of the commerce provisions of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, under factual circumstances which are legally identical and thus require application of one, rather than several divergent rules of law.

In the instant case, decided on October 1, 1973, Circuit Judges Pell and Sprecher, Mr. Justice Clark dissenting, affirmed judgment N.O.V. on what they regarded as a pure question of law involving the correct statutory interpretation of the commerce prerequisites of Section 2(a) in a secondary line case. The District Court's judgment was affirmed despite the fact (1) that petitioners regularly engaged in paving, resurfacing and repairing interstate, state and municipal roads and highways within Illinois; (2) that they performed purely federal work such as the asphalt paving at the recently constructed Federal Judicial Building in Chicago; and (3) that they have directly, or indirectly through subcontract, engaged in work in Indiana at Nike Base Sites and at the Inland Steelworks near Gary, Indiana (Appendix C).*

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* The relevant pages of the Transcript of Proceedings are attached as Appendix C to this Supplemental and Reply Brief. Petitioners have requested the Clerk of the Seventh Circuit Court of Appeals to certify and transmit the same to this Court.

The majority of the Court below held that petitioners as purchasers of paving aggregates nevertheless were not entitled to relief from General Dynamics' disciminatory pricing practices because they did not sufficiently engage in paving work in competition with contractors in the State of Indiana. It thus concluded that purchasers, such as petitioners, who, because of discriminatory pricing are foreclosed from effectively competing in adjacent states, have no right of redress under Section 2(a).

On October 3, 1973, two days later, the Ninth Circuit reached a diametrically opposite conclusion in *Copp Paving Co.* v. *Gulf Oil Co.*, ... F2d ..... (72-2152, 9th Cir., October 3, 1973) (Attached as Appendix A hereto). Contrary to the Seventh Circuit's majority opinion, the Ninth Circuit held that the jurisdictional prerequisites of the statute were sufficiently met when defendants sold at discriminatory prices asphaltic oil, an ingredient like crushed limestone used in road paving, despite the fact that all such sales took place within California. The Ninth Circuit reached this conclusion on the ground that vehicular highways constitute instrumentalities of commerce and persons selling and purchasing materials for their construction and repair were sufficiently in commerce not only for Sherman Act purposes but for Robinson-Patman purposes as well.

The Ninth Circuit rejected the *En Banc* holding of the Fifth Circuit where 7 of the 12 judges sitting on review concluded that the principles announced by this Court in *Moore* v. *Mead's* were inapplicable in a case involving an intrastate businessman attempting to compete with interstate corporations selling locally at substantially lower prices than outside the state. *Littlejohn* v. *Shell Oil Co.*, 483 F.2d 1140 (71-2090, 5th Cir., August 10, 1973; Cert.

Pet. No. 73-688 filed October 24, 1973) (See Appendix B hereto).

These three decisions confront this Court with an astonishing conflict involving majority, concuring, and dissenting opinions of 18 judges, now equally divided in number and expressing divergent views concerning the proper interpretation of the Section 2(a) commerce provisions. This extraordinary situation emphasizes the overwhelming necessity for further expression by this Court regarding the correct interpretation of the commerce provisions of Section 2(a).

In our view these conflicts have resulted because *Moore* v. *Mead's* has been consistently misread by the lower courts to apply only to primary line cases, thus confusing the nomenclature assigned the case with the jurisdictional authority of the federal courts to entertain such actions. Absent further expression by this Court, plaintiffs in Robinson-Patman actions will continue to run afoul of the supposedly peculiar interstate commerce requirements of the Robinson-Patman Act which defendants in recent years have so successfully employed to defeat price discrimination cases.

II.

The Present Action Presents No Factual Dispute Obscuring What The Majority Of The Court Below Has Described As A Pure Matter Of Statutory Interpretation.

The efforts of respondents to create a supposed factual dispute in their brief in opposition emphasizes their effort to denigrate the importance of the question presented and the conflicts below which deserve authoritative resolution by this Court. The majority opinion of the Seventh Circuit, and Mr. Justice Clark's dissent, establishes that

the panel was not at odds on questions of fact but on a question of law. The majority accepted the jury's verdict but nevertheless affirmed judgment N.O.V. based entirely on its first impression interpretation of the commerce provisions of Section 2(a) in a secondary line case. The majority, contrary to respondents' contention, was not prepared to hold that the evidence adduced was insufficient to establish that petitioners attempted, sometimes successfully, to obtain work in Indiana. Mr. Justice Clark makes a pointed note of this fact in his dissent.

We therefore decline to indulge in further debate with respondents concerning the adequacy of the record in this action and are prepared to rely upon the statements of the case set forth in the majority and dissenting opinions. Attempts by respondents to create alleged fact disputes in order to avoid confronting the legal questions presented by certiorari petitions is certainly not a new experience to this Court.

CONCLUSION

For the reasons set forth in our petition and in this supplemental and reply brief, we most respectfully request that a Writ of Certiorari issue to review the judgment and opinion of the Court below.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For The Ninth Circuit

In Re Coordinated Pre-Trial Proceedings In Western Liquid Asphalt Cases
Copp Paving Company, Inc.; Copp Equipment Company, Inc.; and Ernest A. Copp,
Appellants,
vs.
Gulf Oil Company; Union Oil Company of California; Industrial Asphalt, Inc.; Sully-Miller Contracting Company; and Edgington Oil Company,
Appellees.

No. 72-2152

[October 3, 1973]

Appeal from the United States District Court
for the Northern District of California

Before: CARTER and GOODWIN, Circuit Judges, and FERGUSON, District Judge.*

GOODWIN, Judge:

Copp Paving and related antitrust plaintiffs appeal from the dismissal of their claims against certain major oil companies and related defendants for want of jurisdiction.

Plaintiffs process asphaltic concrete and sell and deliver paving materials to construction jobs in California. Except for some imported crude oil which may find its way into

* The Honorable Warren John Ferguson, United States District Judge for the Central District of California, sitting by designation.

their end-product, plaintiffs concede that they process California-produced materials and deliver all of their product to California construction sites.

Defendants Gulf Oil, Union Oil of California, and Edgington Oil Company are producers of asphaltic oil; defendants Industrial Asphalt, Inc., and Sully-Miller Contracting Company are competitors of plaintiffs.

Plaintiffs alleged that defendants had violated §§ 1 and 2 of the Sherman Act by conspiracy in restraint of trade and monopolization, §§ 3 and 7 of the Clayton Act by tying agreements and illegal acquisitions (of Sully-Miller by Union and Industrial Asphalt by Gulf), and § 2(a) of the Robinson-Patman Act by price discrimination.

The district court held, on these facts that the essential element of interstate commerce was missing from the asserted claims based upon various sections of the Sherman, Clayton and Robinson-Patman Acts.

This interlocutory appeal was taken pursuant to 28 U.S.C. § 1292(b) because the threshold question of interstate commerce is critical in the further course of this and related litigation.

The district court held that the production of asphaltic concrete, a substantial amount of which was used to construct interstate highways, was neither "in" nor did it "affect" interstate commerce. We hold that the production of asphalt for use in interstate highways rendered the producers "instrumentalities" of interstate commerce and placed them "in" that commerce as a matter of law.

We start with the proposition that Congress in passing the Sherman Act desired to exercise the full extent of its Constitutional power in restraining trust and monopoly agreements. *United States* v. *Southern-Eastern Underwriter Ass'n.*, 322 U.S. 533, 558-59 (1944); *Rasmussen v. American Dairy Ass'n.*, 472 F.2d 517 (9th Cir. 1972) quoting); *United States v. South Florida Asphalt Co.*, 329 F.2d 860, 867 (5th Cir.) (quoting), *cert. denied sub nom.*

H. R. Wright, Inc. v. United States, 379 U.S. 880 (1964); *United States v. Chrysler Corp. Parts Wholesalers, Northwest Region,* 180 F.2d 557, 559 (9th Cir. 1950) (quoting). As the Supreme Court's reading of the commerce clause has broadened over time, so has its interpretation of the jurisdictional scope of the Sherman Act. *See* cases collected at *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.,* 334 U.S. 219, 230-31 (1948). Thus, every Sherman-Act holding that jurisdiction does not lie is a holding that the evil alleged is beyond the power of Congress to control. Conversely, a holding that conduct is within the reach of Congress' constitutional power for some other purpose is entitled to great weight in a Sherman Act case. *See Rasmussen v. American Dairy Ass'n., supra* at 522, 523 n.13; *Fort Lauderdale v. East Coast Asphalt Corp.,* 329 F.2d 871 (5th Cir. 1964); *De Gorter v. F.T.C.,* 244 F.2d 270 (9th Cir. 1957).

There are, of course, limits to the technique of relying on determinations of the breadth of the commerce power made in one area of congressional regulation in order to determine the breadth of the commerce power in another. First, "interstate commerce is an intensely practical concept drawn from the normal and accepted course of business." *United States v. Yellow Cab Co.,* 332 U.S. 218, 231 (1947). *See North American Co. v. SEC,* 327 U.S. 686, 705 (1946); *Overstreet v. North Shore Corp.,* 318 U.S. 125, 128 (1943). Although the power of Congress over commerce is unitary, different evils sought to be regulated may impinge on commerce in different ways and to differing extents, and the power of Congress may vary accordingly. *See McLeod v. Threlkeld,* 319 U.S. 491, 495 (1943). Regulation of business practices through the antitrust laws, for example, may justifiably reach further than some other types of regulation because the antitrust laws are concerned directly with aiding the flow of commerce.

Second, the Congressional power is not over persons but over practices. It is irrelevant that a person is in

some way engaged in interstate commerce if the practice complained of is in no way related to that commerce. *Yellow Cab Co. of Nevada* v. *Cab Employees, Automotive & Warehousemen, Local 881,* 457 F.2d 1032, 1034 (9th Cir. 1972).

For example, in *United States* v. *Yellow Cab Co.,* 332 U.S. 218 (1947), the Supreme Court held that there was Sherman Act jurisdiction over that portion of a complaint which alleged that the Yellow Cab Company had attempted to monopolize the carrying of passengers between two interstate railroad terminals in Chicago, but held that there was no jurisdiction over the allegations that the same company had violated the Sherman Act in its intracity carriage. And in *Page* v. *Work,* 290 F.2d 323 (9th Cir. 1961), this circuit held that it lacked jurisdiction over a claim by a Los Angeles newspaper that other papers had injured it by diverting some of its legal advertising, a strictly local product, although the newspapers were subject to federal regulation in other ways because they purchased out-of-state newsprint and sold a few papers out of state. While a conspiracy of the newspapers to control the interstate aspects of their business obviously would have been "in" commerce, a conspiracy involving only a strictly local product was only within the power of Congress to control if it "affected" commerce.

A very different function is involved when courts pass on a congressional decision that certain activities affect commerce than when the courts are asked to determine that question for themselves. *Katzenbach* v. *McClung,* 379 U.S. 294, 303-04 (1964). A congressional determination that particular activities affect commerce receives deference in court. *United States* v. *Rodriguez-Camacho,* 468 F.2d 1220 (9th Cir. 1972). However, under the Sherman Act, Congress has left it to the courts to determine whether activities affect interstate commerce. *United States* v. *Darby,* 312 U.S. 100, 120 (1941). Therefore, in reviewing a defendant's conduct for compliance with the Sherman, Clayton, and Robinson-Patman Acts, the court must make its own decision.

In *Overstreet* v. *North Shore Corp.*, 318 U.S. 125 (1943), the Supreme Court held that vehicular roads were instrumentalities of interstate commerce and that persons repairing them were "engaged in commerce" and therefore covered by the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* In *Alstate Construction* v. *Durkin*, 345 U.S. 13 (1953), the Supreme Court extended *Overstreet* to hold that those engaged in the local production of a road surfacing mixture for local use in an interstate highway were also covered by the Act. The test said to be applicable to these cases was "whether the work is so directly and vitally related to the functioning of an instrumentality of interstate commerce as to be, in practical effect, a part of it, rather than isolated local activity." *Mitchell* v. *S. W. Vollmer & Co.*, 349 U.S. 427, 429 (1955).

We agree with the Fifth Circuit in *Fort Lauderdale* v. *East Coast Asphalt Corp., supra,* that those cases control this one. If highway builders and suppliers are "in" commerce because of their close relationship with an instrumentality of interstate commerce for labor relations purposes, they are in commerce for the regulation of price fixing and monopolization. *See Manderille Island Farms, Inc.* v. *American Sugar Co., supra. See also United States* v. *Shubert,* 348 U.S. 222, 226-27 (1955). Furthermore it is not incidental activities unrelated to the interstate nexus of these businesses which were alleged to have been involved here, but illegal manipulation of the very costs and products which put these same businesses "in" interstate commerce for purposes of the Fair Labor Standards Act. The reach of Congress' commerce power for Sherman Act purposes is no shorter than it is for any other purpose.

Plaintiffs asserted claims under the Clayton and Robinson-Patman Acts as well as under the Sherman Act. Section 3 of the Clayton Act prohibits tying arrangements by "any person engaged in commerce." For there to be jurisdiction under the Clayton Act § 7, both the "acquired" and the "acquiring" companies must be "in

commerce." Robinson-Patman price discrimination jurisdiction depends on the sales involved, as well as the selling company being "in commerce." Defendants argue that the "in commerce" requirements of these statutes are satisfied only by sales which cross state lines. While recognizing that this position has recently been adopted by another circuit with respect to the Robinson-Patman Act, it should be noted that the court there did not consider, because the facts did not require it to, whether this state-line test also applies to sales of a commodity (such as asphalt used in the construction of interstate highways) which is itself closely linked to an instrumentality of interstate commerce. *See Littlejohn* v. *Shell Oil Co.*, 42 U.S.L.W. 2114 (5th Cir. Aug. 10, 1973) (en banc). We see no reason why sales which are "in commerce" because of their nexus with an instrumentality of interstate commerce must also satisfy a state-line test of "in commerce." To be sure, the statutory language of the Clayton and Robinson-Patman Acts is not as broad and flexible as that of the Sherman Act. Nevertheless, the fact that these acts were intended to supplement the purpose and effect of the Sherman Act supports a uniform interpretation of the "in commerce" requirement present in all three acts. *See United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963); *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U.S. 346 (1922). *See also* Conference Rep. H. R. Rep. No. 2951, 74th Cong., 2d Sess. (1936). Nor can we accept defendants' argument that the plaintiffs must show not only that the parties and sales are "in" commerce but must show that competition was injured before the court has jurisdiction. This is the result of confusing the substantive with the jurisdictional requirements of the antitrust laws. It is not necessary for a plaintiff to prove his whole case in order to give the courts jurisdiction to hear it.

Plaintiff also appeals the district court's refusal to take pendent jurisdiction of a state antitrust claim against defendants. In view of the complexity of the litigation

and number of parties in these consolidated antitrust actions, the refusal was within the discretion of the district court.

The partial summary judgment in favor of all defendants except the defendant Sully-Miller is reversed, and the cause is remanded for further proceedings consistent with the views expressed herein.

The question of the summary judgment in favor of the defendant Sully-Miller is reserved, as it was not properly before this court under Fed. R. Civ. P. 54(b).

Reversed and remanded.

APPENDIX B

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 71-2090

RALPH H. LITTLEJOHN, JR.,

Plaintiff-Appellant,

versus

SHELL OIL COMPANY, AMERICAN OIL COMPANY and SOONER OIL COMPANY,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

(August 10, 1973)

Before BROWN, Chief Judge, WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GODBOLD, SIMPSON, MORGAN, CLARK, INGRAHAM and RONEY, Circuit Judges.*

BELL, Circuit Judge: The judgment of the district court dismissing the claim asserted by plaintiff Littlejohn under §2(a) of the Clayton Act as amended by the Robinson-Patman Act, 15 USCA, §13(a), was reversed by a panel decision of this court. *Littlejohn* v. *Shell Oil Company,* 5 Cir., 1972, 456 F.2d 225. Upon consideration of

* Judges Goldberg Ainsworth, and Dyer did not participate in the consideration of this case.

the case en banc, we vacate the panel decision for reasons to be hereinafter stated.

In sum, we affirm the ruling of the district court that it was without subject matter jurisdiction under the Act absent proof that at least one of each of defendants challenged sales transactions occurred in commerce.[1] We disagree with the panel majority that the interstate sale requirement of the Act may be satisfied by showing the use of profits derived from interstate commerce to underwrite the local price cutting activity. To this extent, we are in agreement with the views of the dissenting member of the panel. We do agree, however, with the majority of the panel that the discovery proceedings were truncated, albeit inadvertently. We thus vacate the judgments of dismissal and remand with direction that plaintiff be allowed a reasonable period of time within which to complete his discovery but on conditions to be stated in Part III, infra.

Plaintiff alleged that he operated an independent gas station in Garland, Texas which is in the northern portion of Dallas County. He also alleged that defendants, through

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[1] Title 15, U.S.C. § 13(a) in pertinent part provides:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, *where either or any of the purchases involved in such discrimination are in commerce,* where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be sustantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . ." (Emphasis added)

two other stations within one half mile of his station, one selling, respectively, Shell and American gasoline, to other selling the products of American Oil Company, began to sell gasoline to the general public in June 1970 at prices reduced below his selling price although defendants were selling, respectively, Shell and American gasoline, to other dealers in the general Dallas area at normal prices. He alleged that the purpose of defendants in so doing was to drive him out of business and that he was, in fact, forced to close his station because he could not meet the competition engendered by the low prices being charged at the two stations.[2]

The original complaint alleged that Shell and American were marketing gasoline in interstate commerce. There was no allegation, however, that the gasoline delivered to the Shell and American stations in the Dallas area had moved in interstate commerce, or that, with respect to each defendant, at least one sale in interstate commerce was involved. Some months later plaintiff amended his complaint to amplify on his original allegation that profits of defendants Shell and American, derived from their interstate operations, were used by each of them to support their acts of selling gasoline to plaintiff's competitors at the two stations in question at lower prices than were being charged by them to other Shell and American stations in the Dallas area. The amended complaint alleged that Sooner, a Texas corporation with its principal place of business in Oklahoma, was engaged in interstate commerce and was also using its interstate profits to support the price cutting in question.

As distilled, we conclude that, at this point, plaintiff had alleged a classic case of violation of § 2(a) by discrimination in sales at wholesale by sellers to their purchasers who competed with plaintiff, and with resulting injury to his business within the contemplation of § 4 of the Clayton Act. 15 USCA, § 15. See Fn. 3, infra.

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[2] Sooner Oil Company was joined as American's jobber in the Dallas area.

Defendants duly answered. Meanwhile the district court conducted a pre-trial conference and became aware of the possible lack of subject matter jurisdiction in view of the absence of an allegation that, as to each defendant, at least one of the contended discriminatory sales was in interstate commerce. All parties filed briefs on the question. Plaintiff did not allege such interstate sales but relied instead, in the main, on "the use of interstate profits to underwrite" theory expressed in *Moore* v. *Mead's Fine Bread*, 1954, 348 U.S. 115, 75 S.Ct. 148, 99 L.Ed. 145. Each defendant filed an affirmative defense on the ground that none of the sales were in interstate commerce and thus the issue was clearly drawn. The district court then granted summary judgment for each of the defendants on the basis of the absence of subject matter jurisdiction.[3]

I.

In reaching decision on the Robinson-Patman Act coverage question which is presented, we must have in mind the difference between the reach of the Sherman Act, 15 USCA, §§ 1-4, and the reach of § 2(a) of the Robinson-Patman Act, 15 USCA, § 13 (a). We pointed out the difference in *Lehrman* v. *Gulf Oil Company*, 5 Cir., 1972, 464 F.2d 26, 36-37, as modified on rehearing. There we quoted from *Cliff Food Stores, Inc.* v. *Kroger, Inc.*, 5 Cir., 1969, 412 F.2d 203, 208-209, in saying:

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[3] We put aside the alternative theory of the district court that the plaintiff was not possessed of standing under § 2(a) to sue. The reasoning was that the purpose of § 2(a) was to prevent injury to purchasers from the discriminatory pricing policies of the same seller. This is only one purpose of the Act. It is settled that the Act also grants protection to a competitor whose business is injured by the discriminatory pricing policies. *Utah Pie Company* v. *Continental Baking Company et al.*, 1967, 386 U.S. 685, 87 S.Ct. 1326, 18 L.Ed.2d 406; *Moore* v. *Mead's Fine Bread, supra.* See history of Act in *Federal Trade Commission* v. *Anheuser-Busch, Inc.*, 1960, 363 U.S. 536, 80 S.Ct. 1267, 4 L.Ed.2d 1385.

"To maintain an action under Section 13(a) the plaintiff must allege and prove, inter alia: (1) that the defendant is engaged in commerce; (2) that, in the course of such commerce, the defendant has discriminated in price between different purchasers of commodities of like grade and quality; (3) that *'either or any of the purchases involved in such discrimination are in commerce';* and (4) that there is likely to be a severe, adverse effect on competition. (Emphasis added.) 15 U.S.C. §13(a). The language of the Act—requiring discriminatory sales to be 'in commerce'—is far narrower in scope than the 'effect on commerce' test applicable under the Sherman Antitrust Act. *See,* e.g., *Foremost Dairies, Inc.* v. *FTC,* 5th Cir. 1965, 348 F.2d 674; *Jones* v. *Metzger Dairies, Inc.,* 5th Cir. 1964, 334 F.2d 919. In appropriate cases, the Sherman Act may be applied to intra-state activities, including retail sales, if they *affect* interstate commerce. *See, e.g., United States* v. *Greater Kansas City Retail Coal Merchants' Ass'n.* W.D. Mo. 1949, 85 F.Supp. 503. Under the terms of section 13(a), however, at least one of the sales alleged to be discriminatory must actually be *in* interstate commerce. *Walker Oil Co.* v. *Hudson Oil Co.,* 5th Cir. 1969, 414 F.2d 588 [Dated July 8, 1969]. In *Hiram Walker, Inc.* v. *A & S Tropical, Inc.,* 5th Cir. 1969, 407 F.2d 4 [Dated January 31, 1969], this Court stated:

> "[I]n order to come within the provisions of the Robinson-Patman Act, the [plaintiff] must demonstrate that the discriminatory sales were 'in commerce.' • • • Thus, the Robinson-Patman Act, is applicable only where the allegedly discriminatory transactions took place in interstate commerce. This is, '• • • at least one of the two transactions which, when compared, generate a discrimination must cross a state line.'

See also Borden Company v. *FTC,* 7th Cir. 1964. 339 F.2d 953; *Willard Dairy Corp.* v. *National Dairy Products Corp.,* 6th Cir. 1962, 309 F.2d 943."

Taking the *Lehrman* opinion and the *Cliff Food Stores* language as a text, it is plain that plaintiff failed to allege the sine qua non of subject matter jurisdiction, that at least one of the sales involved in the alleged discrimination by the defendants, i.e., between the defendants and their respective Dallas gasoline dealers, was in interstate commerce. This much is conceded by plaintiff.[4]

II.

The question remains whether the holding of the Supreme Court in *Moore* v. *Mead's Fine Bread Company*, supra, creates an exception to the statutory requirement that there be at least one discriminatory interstate sale.

It is here that we disagree with plaintiff and with the panel decision. The exception would purportedly rest on the theory of the discriminator using profits from interstate activities to underwrite the losses sustained in driving a competitor out of business through local price-cutting. There is a statement to this effect in *Moore* v. *Meal's Fine Bread*, 348 U.S. at 119-120. The statement has, however, generally been treated as dictum. See e.g., *Cliff Food Stores, Inc.* v. *Kroger, Inc.*, supra, 417 F.2d at 209; *Willard Dairy Corp.* v. *National Dairy Products Corp.*, 6 Cir., 1962, 309 F.2d 943; *Central Ice Cream Co.* v. *Golden Rod Ice Cream Co.*, 7 Cir., 1961, 287 F.2d 265; *Food Basket, Inc.* v. *Albertson's Inc.*, 10 Cir., 1967, 383 F.2d 785; *Belliston* v. *Texaco, Inc.*, 10 Cir., 1972, 455 F.2d 175.

This view of the *Moore* v. *Mead's Fine Bread* case follows from the facts of that case which demonstrate that the commerce requirements necessary to establish § 2(a) juris-

[4] It is not conceded that facts which might be discovered would not be sufficient to prove one or more interstate sales and thus support an amendment to the pleadings, or that it was necessary, under notice pleading concepts to allege more than jurisdiction generally under § 2(a) as was done.

diction were satisfied, i.e., (1) the defendant was engaged in commerce; (2) the defendant had discriminated in price between different purchasers of commodities of like grade and quantity; and (3), that one of the purchases involved in such discrimination was in commerce. It is to be noted that proposition numbered (3) was not lacking. This much appears from a statement in the opinion. The price cutting against the competitor was in New Mexico but the discriminator was selling at a higher price in Texas out of its same New Mexico bakery. *Moore* v. *Mead's Fine Bread* is a landmark case in that it explicated the coverage of § 2(a) to protect the competitor of a purchaser who purchased from one seeking to destroy the competitor by price cutting. The case did not, however, alter or extend the specific jurisdictional requirements of § 2(a).[5]

III.

Lastly, we come to the question whether plaintiff is precluded from further opportunity to allege and prove that at least one of the sales to be compared to show discrimination by one or more of the defendants was in interstate commerce. Ordinarily, summary disposition of antitrust cases is fraught with danger. *Cliff Food Stores, Inc.*, supra, 417 F.2d at 105. But, as there, summary judgment may be appropriate where the facts involved in a determinative issue of law are clear, undisputed or unrefuted.

As was pointed out in the panel opinion, majority and dissenting opinions, 456 F.2d at 299, 231-232, plaintiff failed to counter the affidavits of defendants filed in support of their motions so as to make out a fact issue on the interstate sales question. See Rule 56(e), F.R. Civ.P., on the requirement to make a counter showing.

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[5] The panel opinion in *Littlejohn* has attracted the attention of the case note writers. See in support of the panel opinion, 41 Cincinnati L. Rev. 689. Contra, 86 Harv. L. Rev. 765. Dubitante, 26 Vand. L. Rev. 146, 4 St. Mary's L. J. 204.

The problem is procedural. This case was handled procedurally in the latter-day trial concept of notice pleading, discovery, pre-trial conference or conferences, and motions, with a trial to follow only if all else fails. The fatality rate in summarily disposing of litigation in this manner is high indeed, and largely the result of prematurity through inordinate attention to theories of law at a time when the facts have not been fully developed.

Here the legal theories going to jurisdiction were clear. The problem, known to all once issue was joined, was whether there had been interstate sales. The defendants were insistent that there had not been. Somehow, in addition to the usual prolix non-trial proceedings, here the case was bifurcated or at least disjointed to the extent that the court intended throughout to pass on the motions for summary judgment without regard to the ongoing discovery proceedings. Plaintiff's position was that he could not show interstate sales without discovering the facts from defendants to show such sales. He filed requests for documents to this end. He requested that the court forego ruling on the motions pending the completion of discovery. The court did not rule on the request but granted the motions.

The matter is clouded by an out of court agreement recorded in a letter from counsel for American to the other counsel in the case. Under the agreement, discovery was to be postponed pending the ruling on the motions for summary judgment.

There had been a previous letter agreement between the parties to the order of discovery and this agreement was the result of a pre-trial conference in January. Defendants were to complete their discovery during March and April. Plaintiff was not to commence his discovery until March 1 and his request for documents was filed on March 1. On March 19 counsel for Sooner asked for a thirty day extension within which to comply with the request for production of documents on the ground that he was in the

hospital. On March 23, counsel for American wrote the joint letter in question to plaintiff's counsel, counsel for Shell, and counsel for Sooner, stating that they had discussed the matter of producing the documents and, in substance, that the court would proceed to rule on the motions for summary judgment prior to compliance with the request for production. The difficulty for plaintiff is that the last paragraph of the letter stated that no production would be required as to any defendant who was dismissed on motion for summary judgment.[6] Not a single document had been produced. The court granted summary judgment on April 28, 1971.

The question of foreclosing plaintiff by this letter addressed to his counsel is close. Out of an abundance of caution and to prevent a possible injustice, we conclude that Rule 56(f), F.R.Civ.P., is applicable in view of plaintiffs definite position, stated in writing by his counsel to the court, that he could not show interstate sales so as to support subject matter jurisdiction without being able to discover facts from the defendants, and his request to postpone adjudication until he could discover. Rule 56(f) provides:

> "Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

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[6] "The intent of the Parties to said suit is that a Defendant with respect to which Plaintiff's suit is dismissed upon the Motions now before Judge Hill shall be required to produce nothing and object to nothing. Defendants with respect to which the Plaintiff's suit is not so dismissed shall comply with Plaintiff's Requests for Production of Documents and/or objects to all or part thereof in the manner stated above."

It is true that this representation was not in affidavit from by plaintiff in person but we think that the written representation by his lawyer, an officer of the court, is in the spirit of Rule 56(f) under the circumstances. Form is not to be exalted over fair procedures.

We thus vacate the summary judgments in favor of the defendants but with the following caveat. Shell has contended by affidavit that its gasoline sold in the Dallas area came from Texas refineries. American states that it acquired the gas which it sold to Sooner in Dallas, and in turn sold to Sooner in Texas as jobber. Without more it would appear from these statements that plaintiff will be hard put to show interstate sales but we think that he should be given the opportunity to discover in an effort to make such proof. We hold however that his discovery must be limited in scope as follows: Plaintiff must first amend his complaint to specifically allege that at least one of the sales in question with respect to each defendant was in commerce, and his discovery must then be directed and limited to seeking proof in support of that jurisdictional allegation.

In addition to the alternative holding by the district court that plaintiff had no standing, discussed supra, there was another holding that plaintiff had failed to demonstrate injury. This holding was entirely premature and is vacated. The motions for summary judgment were limited to the subject matter jurisdiction question and, as has been stated, even these motions came on for disposition before plaintiff could have his day in discovery.

AFFIRMED in part; VACATED in part; REMANDED for further proceedings not inconsistent herewith.

BROWN, Chief Judge, concurring in part and dissenting in part:

I join in Judge Simpson's opinion and thereby Part III of Judge Bell's opinion. I would add only that whether the panel could have reversed the case in view of the

prior Fifth Circuit decisions, those decisions are wrong and ought to be specifically overruled on the basis *Moore.*

SIMPSON, Circuit Judge, with whom *BROWN,* Chief Judge, WISDOM, GODBOLD and MORGAN, Circuit Judges, join, concurring in part and dissenting in part:

I adhere to the views and holdings of my opinion for Judge Wisdom and myself, the majority of the panel by which this case was originally decided. *Littlejohn* v. *Shell Company, et al.,* 5 Cir. 1972, 456 F.2d 225.

On that basis, I concur in Part III of Judge Bell's opinion for the en banc court, remanding this case to the district court to permit amendment to the plaintiff-appellant's complaint and to allow him additional discovery from the defendants-appellees for the purpose of developing proof of one or more discriminatory sales in interstate commerce.

On the same basis, viz: the views expressed in my original panel opinion, I respectfully dissent from Parts I and II of the en banc court's opinion by Judge Bell. I would continue to hold that Robinson-Patman[1] subject matter jurisdiction was present by virtue of the allegations of the amended complaint that Shell Oil Company, American Oil Company and Sooner Oil Company used profits from interstate gasoline sales to underwrite discriminatory intrastate price-cutting tactics employed against Littlejohn, the plaintiff-appellant, without requiring any allegations that one or more discriminatory sales were in interstate commerce. As stated in the panel majority opinion, I construe this to be the teaching of *Moore* v. *Mead's Fine Bread Company,* 1954, 348 U.S. 115, 75 S.Ct. 148, 99 L.Ed. 145.

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[1] § 2(a) of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a).

CLARK, Circuit Judge, with whom GEWIN, THORNBERRY and INGRAM, Circuit Judges, join concurring in part and dissenting in part:

I concur without reservation in parts I and II of the majority opinion prepared by Judge Bell for the en banc court. I respectfully dissent from part III both because I believe it faults the district judge for what was a mistake in trial tactics which plaintiff now wants to second guess and because it undercuts Fed.R.Civ.P.56.

Since Judge Coleman's dissent to the panel opinion deals in detail with the actions of counsel and the chronological context into which the procedural question is cast, it is unnecessary to do more here than touch the high spots. Plaintiffs only indication to the court that he needed to pursue discovery to defend against the motions for summary judgment was couched in the vaguest possible terms. It was contained in his initial responsive pleading to the motions and was in this language:

> Plaintiff would *suggest* that consideration by the Court of summary judgment motions at this early stage of the litigation is premature. The facts related to subject matter jurisdiction are certainly *not before the Court in any complete fashion.* Plaintiff has just recently initiated discovery with respect to jurisdictional facts by service on the Defendants of Requests for Production of Documents Related to Subject Matter Jurisdiction pursuant to F.R.C.P. 34. (Emphasis added)

Following this pleading all counsel reached an agreement which was cast into the form of a letter, *a copy of which was delivered to the court.* This letter agreement unqualifiedly provided that no discovery would proceed until after the court's rulings on the then pending motions for summary judgment had been resolved. A copy of

this letter is set out in the margin.[1] Suffice it to say that at least the trial court could reasonably have thought all

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[1]

Re: Agreement as to Time for Objecting to or Complying with Plaintiff's Requests for Production of Documents in CA-3-4195-D Littlejohn v. Shell Oil Company et al.

Gentlemen:

I am writing to set forth our agreement with respect to the Requests for Production of Documents ("Requests") pursuant to Fed. R. Civ. 34 served by the Plaintiff in the above styled and numbered cause upon Defendants Shell Oil Company, The American Oil Company and Sooner Oil Company in the latter part of February, 1971. As you know, all three Defendants in said Cause filed Motions for Summary Judgment and oral motions under Fed. R.Civ. P. 12(b) which are now pending before Judge Hill.

I have discussed the matters hereinafter set forth with each of you with the exception of James C. Hamill, Esq., attorney for Sooner. I have talked to Kenneth Mayfield, Esq., an attorney in Mr. Hamill's firm who is in contact with Mr. Hamill and who has confirmed that Mr. Hamill approves the terms of our agreement and that Sooner will comply therewith. Each of you and I agree to the following procedure as to the timing for objecting to and/or complying with the Requests of the Plaintiff:

1. If the Court overrules any of the three Defendants' Motions for Summary Judgment or motions under Fed. R. Civ. P. 12(b), thus leaving one or more Defendants before the Court in said Cause, then, each of such Defendants still before the Court after such ruling shall:

(a) File in writing any objections such Defendant may have to Plaintiff's Request for Production of Documents served upon it within seven (7) days after the entry of the Court's Order so overruling such Defendant's Motions; and

(b) With thirty (30) days after the entry of the Order so overruling such Defendant's motions, comply with Plaintiff's Request for Produc-

counsel were then requesting that he proceed to rule on the summary judgment motions without awaiting the results of discovery.

Rule 56(f) is precise and unequivocal. A party who opposes a motion for summary judgment but cannot supply the factual basis for his opposition without the aid of discovery must make his problem known to the court by an affidavit. It is unnecessary here to reach the issue as to whether 56(f) mandates that the showing be under oath, since the substance of what was initially disclosed was so equivocal, and since even this equivocation was wholly destroyed by the later agreement to forgo discovery. The plaintiff simply failed to comply with the spirit or the letter of this part of the Rule.

It well may be that a trial court might choose to overlook such a serious procedural shortcoming or a tactical

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[1] (Continued)

tion of Documents with respect to all of the items enumerated in such Request which the Defendant does not object to within seven (7) days (as set forth above) in accordance with the Federal Rules of Civil Procedure.

2. If the Court sustains any of the Defendants' motions, thus dismissing Plaintiff's claims against the same so that such Defendant is no longer before the Court after such ruling, then the Defendant or Defendants so situated shall be under no obligation or duty to comply with Plaintiff's Requests for Production of Documents in any manner.

The intent of the Parties to said suit is that a Defendant with respect to which Plaintiff's suit is dismissed upon the Motions now before Judge Hill shall be required to produce nothing and object to nothing. Defendants with respect to which the Plaintiff's suit is not so dismissed shall comply with Plaintiff's Requests for Production of Documents and/or object to all or part thereof in the manner stated above.

agreement which hindsight has shown to be bad. Clearly, that court could determine that a just presentation of the issues of a particular case required further pursuit of discovery processes notwithstanding the fact that all counsel may agree not to follow such a course. However, no such broad prerogative properly appertains to an appellate court. Subject to rare exceptions calling for supervisory intervention (which does not extend to adjudging that a trial court has abused its discretion when it does no more than honor an agreement of counsel to postpone discovery), this court's function is to correct the errors of judges not lawyers.

I would affirm every aspect of this case.

Appendix C

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Mayer Paving and Asphalt Company, et al.,

Plaintiffs,

v.

General Dynamics Corporation,

Defendant.

No. 69 C 1803

Before the Hon. J. Sam Perry, and a jury,
Monday, March 27, 1972
10:30 a.m.

The trial was resumed pursuant to adjournment.

Present:

Mr. Borst
Mr. O'Brien
Mr. Gladden
Mr. Szwajkowski

Also Present:

Mrs. Lee O. Mayer
Mrs. Sydney R. Mayer
Mr. Arthur L. Lindbloom, Jr.

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The Court: I want to rule correctly on it. Will you bring the jury, please.

(There was a short interruption, after which the following proceedings were had herein, in open court, in the presence and hearing of the jury;)

The Court: Good morning, ladies and gentlemen of the jury. We have been busy on a legal problem and, of course, I had to take care of my regular call also.

You may proceed.
Mr. Borst: Thank you, your Honor.

At this time I would like to call Mr. Sydney R. Mayer, Jr.

The Court: All right.
The Clerk: Will you raise your right hand, please.
(Witness sworn.)

SYDNEY R. MAYER, JR., called as a witness by the plaintiffs herein, having been first duly sworn, was examined and testified as follows:

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Q. Again, with reference to the year 1958, will you tell us the type of paving work that your company was doing?

A. Well, it is the same type that we have always done. It consisted of some municipal work in the way of roads for different towns or counties, state. The majority of our work was parking lots. We would do approximately, maybe, 15 driveways a year, 20 driveways a year; but we would do about 200 other jobs that averaged approximately $10,000 apiece.

Q. Could you give us, based on your connection with the job, a list of some of the work that you did during the 1958-68 period in terms of paving jobs?

A. Yes, sir. I have some notes, but without looking at them, we did resurfacing and repair work at the Illinois Tollways.

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Mr. O'Brien: Your Honor, I am going to object to this on the grounds that we have a lot of data in, that there is substantiation, invoices; if in that stuff that was introduced earlier there is some reference to some of this material, fine. To let the witness turn loose like this, I think unless there is some invoices or something or a demonstration that there aren't any, I object to it. This is more than background.

Mr. Borst: — that the man cannot testify under oath of his own knowledge with respect to paving jobs which have been done by the company.

The Court: He may testify as to his own knowledge, but the best evidence, however, is the records.

Mr. Borst: We are not trying to prove up the contract, your Honor. We are trying to show the type of work that has been done.

The Court: You may cross-examine as to whether he has records and they may be produced if there is impeachment.

Mr. Borst: Certainly Mr. O'Brien had no trouble with driveways and I just wanted to show that they are not all driveways.

The Court: He may answer.

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By The Witness:

A. We paved the Soldiers Field parking lot, which at that time was the largest parking lot in the world. We did that for General Motors before they put on the Powerama Show.

We did the paving at what they call the Federal Building where we are now sitting when it was built. We did the paving at many hospitals, such as Skokie Valley Hospital, Holy Family Hospital, Luthern General Hospital, Michael Reese Hospital, and four or five others that I can think of like Weiss Memorial Hospital.

We also occasionally, not often, but once or twice a year we would get a state job from the State of Illinois from the State Highway Department.

We would do mainly street jobs from the City of Skokie or the City of Niles or Des Plaines or Park Ridge, up in that area. We would do street work.

This is basically the jobs we did.

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Q. During the 1958-68 period, did you have any qualification with the State of Illinois for governmental work?

A. Yes, sir, we were qualified with the State of Illinois every year.

Q. During the '58-'68 period?

A. Yes, sir.

Q. Would you tell us what state qualification means, if you know?

A. State qualification, every spring a contractor, if he wants to do work for the State of Illinois or for any municipality that is using state funds to do work, must fill out what they call a pre-qualification booklet, which is mainly and basically a financial statement of the company for the year before and up to the present time; and it is sent down to the State of Illinois, State Highway Department, where it is very carefully checked and you are given a pre-qualification rating.

Q. What do you mean by rating?

A. This rating is a figure. I will just use an example. If you are given a pre-qualification rating of a million dollars, you may have under contract at any one time up

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to one million dollars in contracts in which state funds are involved. You cannot bid more than that one million dollars until you have done some of the first million dollars worth of work.

If you finish $500,000 worth of work, then you can bid on another $500,000 worth of work, but you cannot have more than a million dollars at one time.

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Q. During the period 1958 to 1968, do you know what qualification rating your company had?

A. Yes. We generally had a qualification rating of between $750,000 and a million and a half dollars. I always tried to get a rating of over a million dollars.

Q. It varied in that range during that period of time?

A. Yes.

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Q. Would you tell us, during the 1958-1968 period, generally the geographic area in which your company transacted business.

Mr. O'Brien: Your Honor, I will object to this. Again, I think there are invoices and data. From this witness, the plaintiff, it seems to me more than generalities are required.

The Court: For the purpose for which it is being offered, general testimony, it may be admitted. Objection overruled.

Mr. Borst: Thank you, your Honor.

The Court: When we are going to the question of damages, you certainly have to have specific items, and the records.

Mr. Borst: Right.

By the Witness:

A. Our company would work from approximately Waukegan, Illinois, we would work out to Joliet and St. Charles, and we would work into Indiana. We would dowork in Indiana.

By Mr. Borst:

Q. Could you describe for us, perhaps, the geographical area somewhat smaller, where the bulk of your work was derived?

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A. The bulk of our work was, I would say, fifty miles from the Loop of Chicago, in a semi-circle.

Q. I show you what has been marked as Plaintiff's Exhibit 36-A-1 through -14 for identification, and ask you if you can identify that document for us.

A. Yes. This was a contract that we had with the United States Government for the paving of athletic facilities at all the Nike sites around the Chicago area. There were three or four in Indiana, and there were four or five in Illinois.

Q. Would you examine the documents and tell us, if you can tell from the examination of the documents, if there is any reference to Indiana.

A. I don't believe there is any mention in here of Indiana work. Let's see.

Yes, there are four sites here on the back page, which are C-45, C-46, C-47 and C-48, which are all in Indiana.

There are five sites in Illinois, C-44, C-49, -51, -54 and -61.

Q. Is that a true and correct copy of Mayer Paving Company with the Army Air Force Central Welfare Fund, or its branch?

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A. Yes, sir.

Q. Where was that document found?

A. It was found in our job file. We have a job file for each job that we do, and this was in the job file for the Nike site work.

Mr. Borst: I offer it in evidence, your Honor.

Mr. O'Brien: Your Honor, I object to this on the ground that there is no evidence of what material was used in the construction of these four combination athletic facilities. This is my first realization that this case had to do with tennis courts. I thought it had to do with paving jobs. I think it is irrelevant and has no connection with Material Service.

The Court: I presume it was paving at the tennis courts?

Mr. Borst: Let me ask the witness the question.

The Court: Ask the witness.

By Mr. Borst:

Q. What type of work did you do on these Nike sites?

A. This was not a tennis court; this was an all-purpose

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athletic area. It was used for six or seven different sporting events, or games.

The Court: Was it paved?

The Witness: It was paved, your Honor, and it was built with a stone base and a surface, just like any other pavement.

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Mr. O'Brien: Your Honor, the mere fact that the defendant here, we call it one, Defendant Material Service, there is no evidence linking or connecting Material Service with this 1958 Indiana Athletic job.

Mr. Borst: Your Honor, I am trying to establish that this man has been doing business in Indiana, and that there are contracts with Indiana, and that there will be stone invoices.

Mr. O'Brien: Until we see some stone invoices, I know of none for this or any other job.

The Court: Objection overruled. It may be admitted.

(The documents previously marked Plaintiffs' Exhibits 36-A-1 through -14 for identification were thereupon received in evidence.)

By Mr. Borst:

Q. I next show you what has been marked as Plaintiffs' Exhibit 36-B for identification, and ask you whether you can identify that document.

A. I believe that this is merely an addition to the other Nike sites contracts. In other words, they decided to add one more Nike site, and it's like an $8,300 extra for doing

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the paving at another Nike site.

Q. By the "other" Nike site contract, you are referring to 36-A?

A. The one we just looked at, yes. This was a $123,000 contract, and this is an authorization for $8,300 to do the paving at the Nike site in Chesterton, Indiana.

Q. Was that an asphalt paving job?

A. Yes, sir.

Mr. Borst: I offer it, your Honor, in evidence, showing plaintiffs' activity.

Mr. O'Brien: Same objection, your Honor.

By Mr. Borst:

Q. What is the date of the document?

A. May 20, 1958.

Q. Whose signature does it bear?

A. My father's. For us it's accepted by my father and it's signed by Colonel Corey, the Corps of Engineers.

Mr. Borst: I offer it ,your Honor.

Mr. O'Brien: Same objection, your Honor. Regarding that this has to do with Material Service, there is no

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showing, no effort to make a showing, and I consider it kind of playing games with the Court, not to even ask his own man where the stone came from. The fact that he did some work in Indiana for the Government is a totally irrelevant bit of data.

Mr. Borst: Your Honor, we have had the quarrel made here—

The Court: He may be able to connect it up. Admitted.

Mr. O'Brien: Your Honor, I submit with the man on the stand, and the documents in front of us, now is the time to do it, unless there is a deliberate attempt to shovel things in here and hope for the best, which I suggest is the case.

(The document previously marked Plaintiffs' Exhibit 36-B for identification, was thereupon received in evidence.)

By Mr. Borst:

Q. I show you Plaintiffs' Exhibit 36-C-1 through -3 for identification, and I ask you whether you can identify that document for us.

A. Yes, sir. This is a contract between Mayer Paving Company and the Power Construction Company for the

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paving of the roads and parking lots at the Inland Steel Research Center in Gary, Indiana—East Chicago, Indiana.

Q. What is the data of that document?

A. April 1966, the 20th of April.

Q. Could you identify the signatures to that contract

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as they appear?

A. One is mine and one is Mr. Al Gorman for Power Construction.

Q. Do you know whether stone was used on that job?

A. Yes, sir.

Q. Do you know where that stone came from?

A. From Material Service.

Mr. O'Brien: Your Honor, I would like to inquire of counsel whether we have any invoices to support that statement of Mr. Mayer. I have been given hundreds.

The Witness: We have every invoice that we have ever bought from Material Service.

The Court: That will be a proper matter for cross examination.

Mr. Borst: I offer Plaintiffs' 36-C-1 through -3 in evidence, your Honor.

Mr. O'Brien: Same objection, your Honor.

The Court: Admitted. Objection overruled.

(Said documents, previously marked Plaintiffs' Exhibits 36-C-1 through 36-C-3 were received in evidence.)

By Mr. Borst:

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Q. I show you what has been marked as Plaintiff Exhibit 36-D, and I ask you if you can identify that document.

A. This is another contract between Mayer Paving Company and the United States Government. This one is for $36,860. It's for the repairing of roads and parking lots at the same Nike sites, and it's dated June 6, 1964.

Q. Is that document signed?

A. This is Donald McKay, contracting officer.

Q. Does it bear your signature?

A. It probably bears my father's. It does.

Q. You are referring to the last page of the document?

A. Yes.

Q. Whose signature is that?

A. My father's.

Q. What is the date of that agreement?

A. The 13th of May, 1964.

Q. Was there asphalt paving involved with that work?

A. Yes, sir.

Q. Do you know whether stone was used?

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A. Yes, sir.

Q. Do you know the source of the stone?

A. Material Service Company.

Mr. O'Brien: Some objection, your Honor.

Mr. Borst: Same offer, your Honor.

The Court: Admitted for the purpose it is offered.

(Said document, previously marked Plaintiffs' Exhibit 36-D, was received in evidence.)

By Mr. Borst:

Q. I show you what have been marked as Plaintiffs' Exhibits 36-E and 36-F, and ask you if you can identify those documents for us.

A. Well, these are part of the same contracts that I just looked at between the United States Government and Mayer Paving for the rehabilitation of roads and parking lots at the Chicago Area defense sites.

Q. Are we merely duplicating?

A. Well, one is the contract, and these are the specifications, and these are the plans, but it's the same job. It is duplicating.

Mr. Borst: I don't to duplicate, your Honor.

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By Mr. Borst:

Q. Mr. Mayer, would you look at the plans, which have been marked as 36-F, and see if you can find any plans there with reference to the Indiana jobs.

A. Yes, there is a plan on that job for repairing the roads on parking lots at Site C-32, which is Porter, Indiana.

Q. If you care to open them up, feel free to do so.

A. There is another one for—excuse me. That's the same one, Porter, Indiana. There are about four in Porter, Indiana. There's another one at Site C-47, which is Hobart, Indiana. There is another one, Site C-46 which is Munster, Indiana.

I believe that's all that were in Indiana on that job.

Mr. Borst: I would ask that 36-F be admitted into evidence to identify the sites of the job, so there is no question that these are Indiana jobs.

Mr. O'Brien: Some objection, your Honor, and the additional objection that it is cumulative.

The Court: Well, it may be cumulative, but if he just put in one or two, there might be a question of whether it was minimal. Objection overruled. It may

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go in.

(The document previously marked Plaintiffs' Exhibit 36-F for identification, was thereupon received in evidence.)

Mr. Borst: On the same basis I offer Plaintiffs' 36-E. The two documents go together, the specifications and the contract.

The Court: Admitted.

(The document previously marked Plaintiffs' Exhibit 36-E for identification, was thereupon received in evidence.)

Q. When you bid for work in Indiana, Mr. Mayer, did you always get it?

Mr. O'Brien: Your Honor, I will object this speculation.

The Court: The question almost answers itself, but he may answer.

By the Witness:

A. No, we don't always get it.

The Court: You do not always get it when you bid in Illinois either, do you?

The Witness: No, sir. We only get about one out of

ten jobs that we bid on.

By Mr. Borst:

Q. I show you what have been marked as Plaintiffs' Exhibits 37-A, 37-B-1 and -2, and 37-C, and ask you to tell us whether those are jobs bid in Indiana by your company.

A. Yes, sir. The first one is a—

Q. You are referring to 37-A?

A. Yes. It's a bid by the Mayer Paving Company on the paving for the United States Post Office of Hammond, Indiana, and we bid about $26,000, and the paving consists of eight-inch base and a three-inch surface.

Q. Did you get the job?

A. No, sir.

The next one is for—

Q. Are you referring to 37-B-1 and -2?

A. Right. It's a proposal to Swift & Company in Western Springs regarding their plant in Hammond, Indiana, and it's for a one-inch base, two layers of three-inch stone—Excuse me. There's a total of 15 inches of crushed stone, and then a three-inch hot plant mix surface.

Q. When was that 37-B-1 and -2 taken?

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A. February 9, 1966.

Q. Did you get that job?

A. No, sir.

Q. All right, then—

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A. Then there is another one.

Q. Are you referring to 37-C?

A. 37-C, dated January 3, 1967, a proposal by the Mayer Paving Company to General Contractors, regarding the tank car repair building for General American Transporatation Corporation, East Chicago, Indiana, and it is for parking lot paving, which is six inches of base and a two-inch surface.

We didn't get that one, either.

Q. Now, I show you what has been previously marked here 35-A-10 in evidence. It is a list of asphalt plants, your Honor; and I ask you if you will go through that list and identify those companies listed thereon with whom you compete for business.

A. Do you want me to read you each one?

Q. No, only those who you regard and whom your company comes into competition for work.

A. We bid against all of these contractors, all of them.